Office - Supreme Court, U.S.
FILED
SEP 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-2

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

E.J.T. CONSTRUCTION CO., INC.
AND
NATIONAL FIRE INSURANCE COMPANY OF HARTFORD
AND
AMERICAN CASUALTY COMPANY OF READING,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA
FOR THE USE OF
BILLOWS ELECTRIC COMPANY, INC.,

*Respondent.*

## PETITIONERS' REPLY BRIEF ON CERTIORARI

*Of Counsel:*

MORRIS, NICHOLS,
ARSHT & TUNNELL
GEORGE F. GARDNER, III
555 E. Loockerman Street
Dover, DE 19901
(302) 674-5900

RICHMAN & COOK
CHARLES I. RICHMAN
1424 Walnut Street
Suite 1501
Philadelphia, PA 19102
(205) 985-1300

ERNEST CONSTANT RASKAUSKAS, JR.
4801 Massachusetts Avenue, N.W.
Suite 400
Washington, D.C. 20016
(202) 364-8800

*Attorney for Petitioners*

September 7, 1982

Washington, D.C. • THIEL PRESS • (202) 638-4521

## TABLE OF CONTENTS

Page

REPLY TO ARGUMENT II ..... 1

CONCLUSION ..... 4

## TABLE OF AUTHORITIES

***Cases:***

*Continental Casualty Co., Inc. v. Allsop Lumber Co., Inc.*, 336 F.2d 445 (8th Cir. 1964) ..... 2

*D & L Construction Co. v. Triangle Electric Supply Co., Inc.*, 332 F.2d 1009 (8th Cir. 1964) ..... 2

*F. D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116 (1974) ..... 3

***Statutes:***

40 U.S.C. § 270b(a)(1976) ..... 3

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

---

E.J.T. CONSTRUCTION CO., INC.
AND
NATIONAL FIRE INSURANCE COMPANY OF HARTFORD
AND
AMERICAN CASUALTY COMPANY OF READING,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA
FOR THE USE OF
BILLOWS ELECTRIC COMPANY, INC.,

*Respondent.*

---

## PETITIONERS' REPLY BRIEF ON CERTIORARI

---

## REPLY TO ARGUMENT II

Petitioners vigorously dispute the twin pronouncements made at page 9 of the Brief in Opposition to the Petition for Certiorari by Respondent that the law holds that liability of a general contractor and sureties to a materialman under the Miller Act is governed by the contract between the subcontractor and materialman and that the District Court in this case found as a fact

that Petitioner, E.J.T., had agreed to be bound by the same contractual terms as the subcontractor. Petitioners briefly review these two contentions *seriatim*.

As emphasized in Argument I of its Petition for a Writ of Certiorari, Petitioners urge that no court has ever construed the Miller Act to hold that where recovery on the main claim is permitted on the basis that a direct contract existed that *ipso facto* that direct contract will incorporate by reference all of the provisions of a subcontract agreement to which the prime contractor now being charged under a direct contract was never a party. Indeed, where as here the so-called terms were oral and were confirmed in writing only by submissions to the subcontractor (Thomas) with whom the subcontract was made such an incorporation by reference contention is absurd. Such a result is not supported by either of the cases cited by the District Court and Respondent for that proposition, *D & L Construction Co. v. Triangle Electric Supply Co., Inc.*, 332 F.2d 1009 (8th Cir. 1964), and *Continental Casualty Co., Inc. v. Allsop Lumber Co., Inc.*, 336 F.2d 445 (8th Cir. 1964). We repeat that the obvious distinction between *D & L, supra* and *Continental, supra,* and the facts of this case is that in those cases, the Eighth Circuit permitted recovery of prejudgment interest where such recovery was in conjunction with a recovery pursuant to the same subcontract. In this case, to the contrary, the Court below has permitted recovery of a principal claim under an alleged direct contract and recovery of the service charges here complained of pursuant to a completely separate oral contractual arrangement thus creating a form of bifurcation of Miller Act liability previously unknown. Petitioners urge this Court to reverse the findings of the District Court as affirmed by the Third

Circuit in order to prevent a serious, severe, unintended and potentially far reaching interpretation of the scope of the language "sums justly due" under the Miller Act (40 U.S.C. § 270b(a)).

The second contention of Respondent at page 9 of its Argument II that the lower court (District Court) found as a fact that E.J.T. agreed to be bound by the same contractual terms as its subcontractor is not supported either directly or by any implication in any finding made by the Court Below. Indeed if such a finding had been made there could be no contention of emasculation and expansion of the Miller Act. It is clear that the Court Below incorrectly interpreted and then relied on *D & L Construction, supra* and *Continental, supra* and that it never made a finding that E.J.T. as a part of the alleged direct contract relationship which the Court Below found to exist agreed to (or was even aware of) the service charges.

Petitioners respectfully urge that this Court adhere to its prior interpretations of the statutory language "sums justly due" as enunciated in cases such as *F. D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116 (1974), and prohibit recovery of the service charges by Respondent and reverse the Court Below's improper interpretation of the Miller Act in this case.

## CONCLUSION

For the reasons set forth in the Petition for a Writ of Certiorari and for the reasons set forth in this Reply Brief, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ERNEST CONSTANT RASKAUSKAS, JR.
4801 Massachusetts Avenue, N.W.
Suite 400
Washington, D.C. 20016
(202) 364-8800

*Attorney for Petitioners*

*Of Counsel:*

MORRIS, NICHOLS,
ARSHT & TUNNELL
GEORGE F. GARDNER, III
555 E. Loockerman Street
Dover, DE 19901
(302) 674-5900

RICHMAN & COOK
CHARLES I. RICHMAN
1424 Walnut Street
Suite 1501
Philadelphia, PA 19102
(205) 985-1300

September 7, 1982